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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

NO. 75-209

ROY C. WILLIAMS,
Petitioner

v.

BRASEA, INC., VESSEL CIAPESC I, her engines, etc., BENDER WELDING & MACHINE COMPANY, INC., and CONSTRUCTION MACHINERY COMPANY,
Respondents

BRIEF OF RESPONDENT, CONSTRUCTION MACHINERY COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

M. W. MEREDITH, JR.
FINLEY L. EDMONDS
P. O. Drawer 2624
Corpus Christi, Texas 78403
Attorneys for Respondent, Construction Machinery Company

Of Counsel:
MEREDITH & DONNELL
P. O. Drawer 2624
Corpus Christi, Texas 78403

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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BRIEF OF RESPONDENT, CONSTRUCTION MACHINERY COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Construction Machinery Company, prays that the Petition of Roy C. Williams for Writ of Certiorari be refused. In support of that prayer, Respondent would respectfully show the following:

QUESTION PRESENTED FOR REVIEW

In response to Petitioner's statement of Question II of his "Questions Presented for Review" (Pet. for Writ, p.

2), Respondent submits that in the said Question II Petitioner commits two errors. First, he erroneously assumes the defective condition of the ship's equipment which is contrary to the holdings of the Court of Appeals below. Second, he raises a policy question about the applicability of general maritime law, which question is not even presented by the opinion of the Court of Appeals below. Instead, Respondent submits, the issues of law actually presented relevant to the claim of Petitioner against this Respondent can be stated as follows:

I

WHETHER THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE WINCH OF CONSTRUCTION MACHINERY COMPANY, AS DESIGNED, WAS NEITHER DEFECTIVE NOR UNREASONABLY DANGEROUS.

II

WHETHER THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE WINCH OF CONSTRUCTION MACHINERY COMPANY, AS DESIGNED, WAS NOT THE PROXIMATE CAUSE OF PETITIONER'S INJURIES.

III

WHETHER THE COURT OF APPEALS WAS CORRECT IN STATING THAT PETITIONER'S INJURIES WERE CAUSED BY IMPROPER USE OF THE WINCH PORT CATHEAD BY PETITIONER AND/OR SEAMAN EDWARD TERRY.

STATEMENT OF THE CASE

With respect to Petitioner's strict product liability claim against this Respondent, most of the relevant facts are discussed by the Court of Appeals in its opinion which is reported at 497 F.2d 67 (See Appendix, Petition for Writ, p. 56 et seq.). For the purposes of the argument below, Respondent would state the following facts, especially those relating to the issue of the design of Respondent's winch.

Essentially, Petitioner's claim against this Respondent is that the failure of Respondent to design into its winch some sort of brake for the port cathead enhanced his injuries. The accident itself—Petitioner's hands becoming entangled with the taught line on the suddenly turning cathead—was caused by a combination of his carelessness and the intentional re-engaging of power to the winch by his co-worker, Edward Terry.

For the "failure" to design and manufacture such a brake, the District Court held Respondent liable on its interpretation of the theory of strict product liability. However, the District Court specifically held that Respondent was not negligent. The finding of strict product liability was reversed by the Court of Appeals, and Respondent (CMC) was ordered dismissed as a party defendant. The appellate court found substantial evidence to support the trial court's conclusion of no negligence.

In reversing, the Court of Appeals held that the CMC winch was neither defective nor unreasonably dangerous. 497 F.2d at 79 (App., Pet. Writ, pp. 76-78). Important to this determination was the testimony which revealed that winches, and especially winches on shrimp boats,

are practically never equipped with braking devices. It was testified that ninety to ninety-five percent of the market for shrimp boat winches is commanded by four makes, including CMC, and none of these winches have a separate brake on the winch cathead. In fact, there was no direct evidence of a winch with a brake on a shrimp boat.

Of the shrimpers who testified, the Petitioner had 41 years experience on shrimp boats. Robert N. Jenkins was a captain for 26 years on shrimp boats. Edward Terry had 15 to 20 years experience. Jerry Richo, the third crew member on the CIAPESC I at the time of the accident had 27 years of shrimping experience. All of these men were familiar with winches, similar to CMC's, and none had any brakes on the catheads. No one testified about any similar accident or injury.

All the crewmen on the CIAPESC I knew and appreciated how the winch worked. They knew the CMC winch lacked any brake. They knew it continued to turn several times after the power was dis-engaged.

Also relevant to the appellate court's holding are the facts that catheads are practically indispensable to the shrimping business and that the installation of a brake would substantially increase the cost of the winch.

Agreeing with the District Court, the Court of Appeals concluded that the cause of the accident and Petitioner's injuries was the action in turning on the power to the winch while Petitioner's hands were on the whipline and in close proximity to the cathead. The Court of Appeals further concluded that the lack of any brake was not the proximate cause of the injuries.

Depending on whether the Petitioner had ordered Terry to re-engage power to the winch, one or the other of the men misused the product. If Petitioner gave the order, the appellate court surmised, his assumption of the risk could be properly inferred based upon the relevant findings of the District Court. If he did not give the order, then Terry's unanticipated product misuse — he did intentionally engage power — could be inferred.

SUMMARY OF THE ARGUMENT

Most of Petitioner's allegations relate to issues not in this case. All of his allegations are without merit. None warrant the granting of a writ.

In relying upon the theory of strict product liability set out in the American Law Institute's *Restatement (Second) of Torts,* Sec. 402A (1965), the Court of Appeals was consistent with the few other courts of appeals that have considered claims of strict product liability in maritime cases. The opinion of the appellate court below is not in conflict with any decision by this Supreme Court or with any other court of appeals. In claiming that the lower court failed to apply federal maritime law, the Petitioner fails to demonstrate any substantive conflict between maritime law and the material holdings of the court below.

His complaint about the lower court's refusal to decide whether maritime law incorporates the theory of strict product liability is wholly lacking. The deferral of the decision for an appropriate case certainly does not conflict with the one other court of appeals which has acknowledged the incorporation.

No error is shown in the appellate court's holding that the CMC winch was neither defective nor unreasonably dangerous. Most of the cases cited are not in point, and none require any different result under maritime law.

Because Petitioner can show no error in the lower court's finding favorable to this Respondent on the defective condition issue, then his other allegations become academic. Foreseeability is an element of the theory of strict liability in defective design cases. It is a vital factor in measuring the magnitude of any risk for purposes of balancing any such magnitude against the utility of the risk.

The Court of Appeals correctly ruled against Petitioner on the causation issue. Respondent's winch didn't cause the accident. The accident was caused by the irresponsible conduct of either Petitioner Williams or Terry or both. This was a unique incident for which Respondent should not be held strictly liable.

Moreover, as the Court of Appeals notes, in addition to there being no showing of defective condition or of proximate causation, the evidence supported findings of Williams' assumption of the risk (if he gave the order) or unanticipated product misuse by Terry (if no such order were given). As previously stated, the misuse of the winch by Williams and/or Terry—turning on the power when the whipline was tangled on the winch and while Williams' hands were on the line and in close proximity to the winch cathead—caused the accident and the injuries.

With respect to Petitioner's claims concerning the lower court's holdings relevant to Terry and Brasea, the lower court correctly remanded the case for the District

Court to make a finding on whether Petitioner gave the alleged order to Terry to re-engage power to the winch. If Petitioner gave the order, then Terry and Brasea should not be held liable for negligence. If Petitioner did not, then Terry and Brasea were negligent.

Finally, since the District Court's finding of unseaworthy condition was specifically buttressed by its incorrect findings of defective condition of the CMC winch and the Bender installation of certain equipment, the Court of Appeals correctly set aside the unseaworthy condition finding.

REASONS FOR REFUSING TO GRANT THE WRIT

Respondent submits that review on writ of certiorari should not be granted. None of the issues promptly before this Court in this case warrant the granting of a writ. The reasons for refusing to grant the writ are many, and may be summarized as follows:

1. The decision of the Court of Appeals below is not in conflict with any decision of any other court of appeals.

2. The decision is not in conflict with any decision of this Supreme Court.

3. No important question of federal law is raised by the case which needs to be settled by this Court now.

4. The Court of Appeals has not decided any federal question in a way in conflict with applicable decisions of this Court.

5. No necessity has been shown to call for an exercise of this Court's power of supervision.

6. At best, the Petitioner has raised abstract questions of law the resolution of which will not alter the holdings of the Court of Appeals.

7. At best, Petitioner raises issues the resolution of which are of importance to the parties, but not significant to the public.

As to this Respondent, CMC, Petitioner asserts a number of propositions none of which are meritorious, or, at least, are material to the decision of this case. Respondent will respond to Petitioners argument by beginning first with the allegations relating to incorporation of the theory of strict product liability into federal maritime law. Next, Respondent will deal with the allegations relating to the law applied by the Court of Appeals to the strict product liability issues raised in the case. Then Respondent will discuss the soundness of the reversal by the Court of Appeals of the district court's holding respondent liable solely under the theory of strict product liability.

I

DETERMINATION OF THE QUESTION OF INCORPORATION OF STRICT PRODUCT LIABILITY INTO FEDERAL MARITIME LAW WAS UNNECESSARY, AND THE COURT OF APPEALS' DEFERRAL OF DETERMINATION OF THE QUESTION PRESENTS NO CONFLICT WITH ANY OTHER COURT OF APPEALS.

Immaterial to the resolution of this case, and certainly no ground for reversal, is Petitioner's complaint about

the refusal of the Court of Appeals ". . . to consider the question of whether the law of strict product liability is now incorporated in the maritime law. . ." (Pet. for Writ, p. 16). To the contrary, the court considered the question, but thought it best to leave open the question of incorporation. 497 F.2d at 78 (App., Pet. for Writ, p. 74).

It would not have advanced Petitioner's cause if the Court of Appeals had acknowledged such an incorporation. Why? The reason is stated in that court's opinion: "[*E*]*ven if* products liability law is to be incorporated into our general maritime law, there can be no liability under the facts of this case." *Ibid.*

Petitioner's argument that the refusal of the Court of Appeals to consider the incorporation is in conflict with other decisions is totally without merit. As pointed out by the Court of Appeals, various district courts have split on the issue of incorporation, and only one Circuit Court has so far passed judgment on the issue—in favor of the incorporation. *Lindsay v. McDonnell Douglass Aircraft Corp.*, 460 F.2d 631 (8th Cir. 1972, 497 F.2d at 78 (App., Pet. Writ, p. 74). It goes without saying that the court's deferral of resolution of the question certainly presents no conflict with the affirmative holding in the *Lindsay case,* nor with any other case in which the issue has been considered.

Thus, the significant issues are whether the theory of strict product liability applied both by the Court of Appeals and the District Court is a correct one, assuming the viability of incorporation, and whether the Court of Appeals' application is correct.

II

IN RESORTING TO THE THEORY OF STRICT PRODUCT LIABILITY SET OUT IN THE *RESTATEMENT (SECOND) OF TORTS*, SEC. 402A, THE COURT OF APPEALS DID NOT FAIL OR REFUSE TO APPLY FEDERAL MARITIME LAW TO PETITIONER'S CLAIM AGAINST CONSTRUCTION MACHINERY COMPANY.

Petitioner argues that ". . . the Court of Appeals refused to apply federal maritime law in determining the legal rights and obligations governing Petitioner's claims against Bender and CMC. . ." (Pet. Writ, p. 14). Related is his attack on the validity of the lower court's application of the American Law Institute's *Restatement (Second) of Torts*, Sec. 402A (1965). (Pet. Writ, p. 14, pp. 19 et seq.).

The arguments put forth by Petitioner are without merit. Unquestionably, in its discussion of its reasons for holding CMC not liable in tort under the theory of strict product liability, the Court of Appeals relied upon the *Restatement of Torts 2d*, Sec. 402A, and the accompanying Commentary prepared by the American Law Institute. Just where is the error? What is that "federal maritime law" of strict product liability which Petitioner accuses the Court of Appeals of ignoring? Petitioner fails to reveal its substance or source.

There is no developed body of "federal maritime law" of strict product liability different from that stated in the *Restatement*. The only Circuit Court, the Eighth, which has specifically incorporated into federal maritime law the theory of strict product liability, *Lindsay v.*

McDonnell Douglas Aircraft Corp., 460 F.2d 631 (8th Cir. 1972), specifically applied the said *Restatement:*

> "We hold that the correct law to be applied to this case is expressed in Restatement (Second) of Torts § 402-A (1965), as it is the best expression of the doctrine as it is generally applied, and for the additional reason that several federal courts have previously used that section in maritime cases [cases cited]. *Lindsay*, 460 F.2d at 636.

One other Circuit appears to have applied the theory of strict product liability in a case within its admiralty jurisdiction. *McKee v. Brunswick Corp.*, 354 F.2d 577 (7th Cir. 1965). There the theory was applied to fix liability on the seller of the vessel for injuries to passengers. However, the Seventh Circuit did not purport to incorporate the theory into federal maritime law. Rather, the Seventh Circuit appears to have referred to Illinois law. Illinois had adopted the rules of strict liability in tort, without any requirement of privity between the manufacturer and/or seller and the user and/or consumer. *Suvada v. White Motor Company*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965); McKee, 354 F.2d at 583. Interestingly enough, the Illinois Supreme Court had noted that the views expressed in Suvada coincided with the position taken in Section 402A of the *Restatement! McKee, supra.*

In holding that CMC and Bender were liable to the Petitioner on strict product liability grounds, the District Court used the language of the *Restatement* to state the legal theory (App., Pet. Writ, p. 44). Petitioner was satisfied with the application of the *Restatement* then.

In his briefs and argument before the Court of Appeals, Petitioner sought to uphold the decision of the District Court, relying upon his and the District Court's construction of the *Restatement.* Not until the Fifth Circuit construed the rule of the *Restatement* to exonerate CMC and Bender did Petitioner waver in his belief in that statement of the law. Now he attempts to discredit the *Restatement* by attempting to show that some state courts may have applied portions of the *Restatement* somewhat differently. Suffice it to say that Petitioner presents no different interpretation by any Circuit Court, or district court, on the liability issues presented in the instant case. Nor does Petitioner even present any relevant and differing interpretation applied by any state jurisdiction.

III

THE COURT OF APPEALS CORRECTLY HELD THAT THE WINCH OF CONSTRUCTION MACHINERY COMPANY, AS DESIGNED, WAS NEITHER DEFECTIVE NOR UNREASONABLY DANGEROUS.

A. The Theory of Strict Product Liability

The District Court found CMC not negligent. CMC was held liable to Petitioner solely upon the trial court's construction of the theory of strict product liability as stated in § 402A of the *Restatement.* In reversing the District Court, the Court of Appeals held that CMC did not breach any duty to Petitioner, in a strict product liability sense, and, even if so, CMC's winch was not the legal cause of Petitioner's injuries, in a strict product liability sense.

The CMC winch had no braking mechanism on either of the catheads. The Court of Appeals, in effect, found that CMC owed no duty to Petitioner to design any braking mechanism into its winch. In terms of the *Restatement,* the appellate court held that the winch was neither "defective" nor "unreasonably dangerous". 497 F.2d at 79 (App., Pet. Writ., pp. 77-78).

According to the theory of strict liability set forth in the *Restatement of Torts 2d,* Sec. 402A. . .

> "One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, . . ."

The Court of Appeals observes that Section 402A sets out three requirements for strict liability—(1) the product must be "in a defective condition"; (2) it must be "unreasonably dangerous to the user"; and (3) it must be the "cause" of the injury. 497 F.2d at 78 (App., Pet. Writ, p. 74). When referring to the requirement of a defective condition, the usual situation involves a product which was not manufactured as intended. There was a miscarriage in the manufacturing process; it is an "impure" product. However, the instant case involves a winch which was manufactured just as it was designed or intended. Instead, the "defective condition" is alleged to be the design of the winch without a brake on the port cathead.

The Court of Appeals correctly notes that in these product design cases the phrase "defective condition" has no meaning independent from the requirement that

the product also be "unreasonably dangerous". 497 F.2d at 79 (App. Pet. for Writ, p. 77). See, for example, *Ross v. Up-Right, Inc.*, 402 F.2d 943 (5th Cir. 1668); Wade, "Strict Tort Liability of Manufacturers", 19 S.W. L.J. 5, 15 (1965). The product is "defective" only because its design made it unreasonably dangerous to the user.

Stated generally, CMC had the duty to design, manufacture, and sell a winch the use of which is not unreasonably dangerous, or, to state it another way, a product at least reasonably safe to use.

The doctrine of strict liability does not require a perfectly safe or "fool-proof" product. Strict liability, by its terms, does not automatically apply just because use of the product entails some risk or danger. It applies only when use of the product is "unreasonably" dangerous. As the Court of Appeals had observed before, the requirement that the defect, to create liability, render the product unreasonably dangerous reflects a realization that many products have both utility and danger. *Helene Curtis Industries, Inc. v. Pruitt,* 385 F.2d 841 (5th Cir. 1967). In fact, it has been said that, in these defective design cases, the courts must balance the utility of the risk against the magnitude of the risk from use of the product to determine whether the use is unreasonably dangerous. *Pruitt;* Wade, *supra.*

To balance the utility and the magnitude of any relevant risk posed by the absence of an "adequate braking mechanism" on the port cathead, the risk must be defined. The risk is that which satisfaction of the duty (assuming such a duty) would have avoided. The risk with which we are concerned here was the risk of

aggravation of an injury from an accident caused by the irresponsible conduct of Petitioner Williams and/or Seaman Terry in turning back on the power to the winch port cathead.

Should CMC be held liable for failing to anticipate and guard against the irresponsible individual conduct of Williams and Terry which merged to cause the accident? More specifically, did CMC have any duty to design to avoid enhancement of injuries caused by a unique "misuse" of its product? CMC emphatically replies "No." CMC had no reason to anticipate and to guard against the subject occurrence.

This being the only accident involving a shrimp boat winch in the evidence, obviously the magnitude of the risk was very slim, if not negligible. There is no evidence in the record of any frequency of occurrence of this sort of accident. Thus, this case is unique whereas, for example, automobile collisions and lawnmower accidents occur frequently.

What was the utility of the risk? It means a less expensive product, one less difficult to install, and one less difficult to use (R. 964-970). This type of winch, having no separate brake on the cathead, was common in the industry. Williams and his crew were familiar with this kind of winch and used it for many tasks. No brake was needed in order for the cathead to perform its intended functions—to pull in lines for anchors, for nets, for cargo.

After balancing the utility of the risk of aggravation with the slight degree of risk (one incident!), CMC contends the conclusion to be overwhelmingly in favor or utility. The winch was simply not "unreasonably danger-

ous" under the theory of strict product liability. Hence, such a duty (to add a separate brake to the catheads) should not be imposed.

Wade has set out a number of factors which he believes should be considered in making the determination of whether a product is unreasonably dangerous:

"(1) The usefulness and desirability of the product.

(2) The availability of other and safer products to meet the same need,

(3) The likelihood of injury and its probable seriousness,

(4) The obviousness of the danger,

(5) Common knowledge and normal public expectation of the danger (particularly for established products),

(6) The avoidability of injury by care in use of the product (including the effect of instructions or warnings), and

(7) The ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive." Wade, *supra,* at 17.

After examining the record and the findings of the District Court, the Court of Appeals applied the foregoing factors or variables to the evidence and found:

> "Paraphrasing the variables suggested by Dean Wade, 19 S.W.L.J. at 17, we find the following in support of a 'cost outweighs benefit' conclusion here: (1) catheads are practically indispensable to the shrimping business; (2) few, if any, are equipped with a braking device, (3) the likelihood of injury

> is remote, limited to peculiar circumstances such as occurred in this unusual case; (4) the inherent danger is obvious to all; (5) injury could have been avoided but for the misuse of the product; and (6) installation of a brake would substantially increase the cost of the winch." 497 F.2d at 79 (App., Pet. Writ, pp. 77-78).

It is submitted that, in order to hold CMC liable for any of Williams' injuries, this Court must ignore the few limitations in the *Restatement* theory of strict product liability and make that additional "giant leap" to absolute liability in the broad area of products liability. To sustain Petitioner's claim against CMC, this Court would have to hold that product liability exists whenever an injury occurs or is enhanced in connection with the use of a product. No court, state or federal, has gone so far. Even Petitioner is reluctant to urge such a proposition. Petitioner couches his relevant arguments in terms of the assumed "defective" condition of CMC's winch.

B. Enhancement of Injuries

It is clear that the alleged defect, the absence of an "adequate braking mechanism", did not cause the accident. It was Williams' and/or Terry's conduct which caused the accident from which Williams' injuries stemmed. Instead, the trial court found the absence of an "adequate braking system" to be a producing cause of injuries to Williams. The "defect" enhanced or aggravated Williams' injuries. Even in the trial court's opinion, it was the return of power to the winch, causing the cathead to turn again, which caused the accident. With this return of power, Williams was caught in the line because his hands were too near the cathead.

Thus, this case falls into the category of the few cases in which the absence of a safety device allegedly aggravated or enhanced the plaintiff's injuries, rather than caused the accident.

With respect to this danger or risk of enhancement, reference should be made to Comment i of the *Restatement* which further clarifies the rule by explaining that, to be unreasonably dangerous, the product. . .

> ". . . must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."

As already pointed out, the relevant danger or risk, which is the focal point of the hypothetical cathead brake, was the enhancement or aggravation of injuries initiated by the conduct of a third party — i.e., Terry turning the power back on. Since everybody was aware the cathead had no separate brake, how can it be said that it posed a greater danger than that ". . . contemplated by the ordinary consumer [or user] . . . with the ordinary knowledge common to the community as to its characteristics? The Court of Appeals agrees. 497 F.2d at 79 (App., Pet. Writ, p. 77).

This aspect of the liability issue was recently similarly construed by the Tenth Circuit in a diversity case, *Hartman v. Miller Hydro Company*, 499 F.2d 191 (1974), in which the court applied the *Restatement* and cites Comment i thereto.

It has been held that recovery can be had under §402A where the lack of a proper safety device constitutes a defective design. *Larsen v. General Motors Corp.*, 391

F.2d 495 (8th Cir. 1968), Minnesota law applied; *Nanda v. Ford Motor Co.*, 509 F.2d 213 (7th Cir. 1974), Illinois law applied and *Larsen* followed. In these cases the crucial issue is whether the scope of the manufacturer's duty was broad enough to require him to provide the subject safety device.

In *Larsen,* the court held that in light of the well-known risk of automobile collisions an automobile manufacturer has the duty to design his cars so as to avoid unreasonable risks of harm to the user. Involved there was the claim that the improper placement of the steering assembly enhanced the driver's injuries in a collision.

In *Nanda,* the court held the manufacturer liable for injuries to passengers because of the absence of a fire wall between the passenger compartment and the gas tank. The court reasoned that because of the likelihood of rear-end collisions and consequent serious injuries to passengers, the manufacturer had a duty to install a fire wall.

There is a split of authority over the issue of whether the auto manufacturer must design to abate injuries from the "second collision". The leading case for the opposite view is *Evans v. General Motors Corp.*, 359 F.2d 822 (7th Cir. 1966), Indiana law applied. Involved in *Evans* was the plaintiff's claim that because of an "X" frame in the 1961 Chevrolet station wagon, instead of a perimeter or side frame, the collision of decedent's auto with another automobile allowed the left side to collapse in upon the decedent, inflicting fatal injuries. Observing that the manufacturer had no duty to make his cars accident proof, the Court exonerated the manufacturer by holding that his duty to design safely went no farther than to design so as to enable the automobile to function as a

form of transportation. The duty did not include any requirement of designing so as to abate collision injuries. As a matter of law, collisions are not within the scope of an auto's intended use.

A recent case following *Evans* is that of *Turner v. Big Four Automotive Equipment Corp.*, 511 F.2d 133 (5th Cir. 1975), applying Mississippi law which disallows liability for enhancement.

Even *Larsen* does not support the district court's holding against CMC. The alleged "defective" condition, the placement of the steering assembly, was latent or hidden. The alleged defective condition here was open and obvious to all. Secondly, the steering design would function without the required extra effort of a man, but man's extra effort is required in the instant case. Someone would have had to apply the brake, if there had been one. The steering assembly in the Corvair was not located like those in other vehicles. Also, *Larsen* was decided on a negligence theory. In fact, the court expressly made no comment on the issue of strict liability or implied warranty of merchantability. *Larsen,* 391 F.2d at 506.

Finally and importantly, the Larsen court was confronted by a set of risks far greater in magnitude than that presented here concerning CMC's winch. The *Larsen* decision turns on the court's finding that the magnitude of the risk or involvement of the manufacturer's vehicle with other vehicles in injury-producing accidents broadens the automobile manufacturer's duty to provide a safe vehicle for its "intended use". See *Larsen,* at 502. Also significant is the emphasis placed by the court on the fact that injuries from automobile collisions ". . . are readily foreseeable as an incident to the normal and expected

use of an automobile. . . Collisions with or without fault of the user are clearly foreseeable by the manufacturer and are statistically inevitable." *Ibid.* See also, *Nanda, supra.*

Obviously, the magnitude of the risk of injury prevalent in an automobile situation is not the same as that of CMC's winch. No evidence was produced of any injury to a seaman in the use of the winch cathead, such as happened to Williams.

C. Evidence of Available Safety Design

As found by the Court of Appeals, the evidence was clear that winches with brakes were non-existent on trawlers used by the shrimping industry. 497 F.2d at 79 (App., Pet. Writ, p. 76). In fact, there was no evidence in the record of similar winches having brakes on their catheads (R. 968-9). None of the witnesses were familiar with one on a shrimp boat (Jenkins, R. 567; Williams, R. 799; Koloc, R. 979; Richo Deposition 35; Bender, R. 1211).

Anthony R. Koloc, the sales engineer for CMC, called by the Plaintiff-Petitioner under the adverse party rule, testified about the practical design problems in adding some type of brake. (R. 848, 964, 969-970). No expert testimony was adduced to support the contention that the design was unreasonably dangerous.

The conclusion is inescapable that the trial court premised its conclusion of strict liability upon a mere concept with no supporting evidence as to practicality, as to design, as to cost, as to demand, etc. As the Court of Appeals concluded, the only evidence on these factors supports a legal conclusion of no duty to design and

manufacture a brake on the cathead. The district court speculated and built inference on top of inference.

In the cases allowing recovery under the doctrine of strict liability upon a safety design defect theory, affirmative evidence was always produced of existing safer designs, usually along with affirmative expert testimony. *Larsen, supra; Nanda, supra.*

D. Strict Liability in Terms of Conduct

The terminology of the doctrine of strict liability characterizes the product rather than the defendant's conduct. But it has been observed that the issue can be phrased in terms of a defendant's conduct. *Pruitt,* 385 F.2d at 850; Wade, *supra;* Keeton, "Products Liability—Inadequacy of Information", 48 T.L.R. 398. First, assume that the defendant had knowledge of the risks involved in use of the product. Then, "for the design to be unreasonably dangerous, it must be so dangerous that a reasonable man would not sell the product if he knew the risks involved." *Pruitt, Id.;* Wade, *supra* at 10.

Again, applying the above test, the result should be the same here. Even from the advantage of hindsight, can it be said that, as a matter of law, CMC had a duty to provide a brake for the cathead? Discussed above are the considerations of utility of use of the winch which by far outweigh the incidental risk of enhancement of injuries from an accident caused by someone's misuse of the winch.

The only evidence produced by Plaintiff relevant to the degree of risk of enhanced injury in use of the winch cathead is that of his own accident. Isn't it strange that a design which has been used for years and years by

countless numbers of people without serious harm is now condemned as unreasonably dangerous to life and limb?

Just because this accident happened is not sufficient justification for imposing a duty to anticipate the realization of what was a unique event.

E. Critique of Petitioner's Arguments on CMC's Duty

Arguing the existence of conflict between the decision by the lower court and decisions by other federal courts over the "correct" interpretation of Section 402A, *Restatement,* Petitioner fails to cite any federal cases in conflict. Again, there are only a few in the maritime field and none are in conflict with the decision here. *Lindsay, supra; McKee, supra.*

Relying exclusively upon a California case, Petitioner asserts that liability under Section 402A is not predicated on whether the product was "unreasonably dangerous", but, instead, is established "simply" by showing the product was "defective" and that the defect proximately caused the harm to a foreseeable user of the product. *Cronin v. J.B.E. Olson Corp.,* 501 P.2d 1153 (Cal. Sup. 1972). See Pet. for Writ, p. 22. Although the California Supreme Court has held that California law now requires proof only of a defective condition, as that court was quick to point out in *Cronin,* there remains the judicial task of applying the defectiveness standard to the facts of each case. 501 P.2d at 1162. In limiting a plaintiff's burden in a strict product liability case in California, the California Supreme Court by no means intended to make sellers and manufacturers liable for all injuries involving the use of its products. There remains ". . . the necessity of proving that there was a defect in the manufacture or

design of the product and that such defect was a proximate cause of the injuries." 501 P.2d at 1162.

As it may relate to defective design cases, Keeton has criticized the *Cronin* opinion. Keeton, "Products Liability and the Meaning of Defect," 5 St. Mary's L. J. 30 (1972). For cases of defective design, Keeton argues that the term "unreasonably dangerous" helps to define the term "defect."

A second case cited by Petitioner in line with the *Cronin* case is an opinion by a New Jersey Superior Court, Law Division. *Glass v. Ford Motor Co.*, 304 A.2d 562 (N.J. Super., Law Div. 1973). The trial judge opined that the jury instruction should be on the defectiveness standard alone. However, the Supreme Court of New Jersey has not gone that far, having recently acknowledged the *Glass* opinion but reserving the issue. *Brody v. Overlook Hospital,* 66 N.J. 448, 332 A.2d 596 (1975).

No federal case is cited by Petitioner in which the plaintiff's burden has been restricted to a showing of defective condition only. Especially, there are no federal maritime cases on the point.

Assuming, *arguendo,* that only defective condition need be found, without an additional finding that the defect was unreasonably dangerous, nevertheless Petitioner's challenge to the Court of Appeals decision is without merit. Was the winch defective because it had no separate brake on the port cathead? The Court of Appeals specifically answered "No". 497 F.2d at 79 (App., Pet. Writ, p. 77).

Nowhere in his Petition for Writ does the Petitioner cite any affirmative authority for his proposition that the

winch was defective. Among the cases cited in this portion of his argument (Pet. Writ, pp. 23-24), Petitioner cites another very recent opinion by the lower appellate court: *Weakley v. Fischbach & Moore, Inc.*, 515 F.2d 1260 (5th Cir. 1975). However, the court held in *Weakley* that the contractor had failed to establish a design defect in the subject electrical isolator switch.

The contractor attempted to show that the switch was defective because there were other design alternatives which, had they been adopted, would have prevented the accident or minimized its consequences. To that argument, the Fifth Circuit replied:

> "Such a showing, by itself, is insufficient to establish liability [authority cited]. It is one thing to show that the defendant might have designed a safer product; quite another to show that the product he did design was unreasonably dangerous. The defendant is not obligated to design the safest possible product, or one as safe as others make or a safer product than the one he has designed, so long as the design he has adopted is reasonably safe [authority cited]. *Weakley*, 515 F.2d at 1267.

Similar to the instant case, in *Weakley* the contractor produced no evidence that the design deviated from accepted industrial practice, nor did it produce any expert testimony to support its contention that the design was unreasonably dangerous, nor did it produce any evidence of previous accidents or previous switch failures. 515 F. 2d at 1268-1269. It is submitted that the reasoning in *Weakley*, if anything, bolsters this decision by the Court of Appeals.

The next case cited by Petitioner is a California opinion that was handed down by that state supreme court on the same day it announced its opinion in *Cronin, supra. Luque v. McLeon,* 501 P.2d 1163 (Cal. Sup. 1972). In *Luque* the user of a rotary lawnmower slipped on wet grass and fell backward. His hand slipped through the opening for ejecting cut grass and into the blade.

The sole issue on appeal in *Luque* was whether the defendant was entitled to an instruction on the plaintiff's awareness of the absence of a safety guard over the opening.

The case is not in point on the duty issue. In fact, the court there notes that such an injury was foreseeable, that safety guards were available and would have cost the manufacturer about One Dollar to install. *Luque, supra.* While such injuries with rotary lawnmowers occur frequently, there is no evidence in our record of any similar accident with a winch on a shrimp boat in an industry many decades old. Further, there is no evidence of any other winches with brakes on shrimp boats, and there was uncontroverted evidence as to the substantial additional cost to be incurred in designing and installing such a hypothetical brake.

Neither in point is *Brown v. Quick Mix Co.,* 454 P.2d 205 (Wash. Sup. 1969). The case is also concerned with the effect of the plaintiff's awareness of the alleged defect. Interestingly, the plaintiff there testified that he wasn't aware of the particular danger. More importantly, the danger was the cause of the accident rather than the cause of enhancement of injuries resulting from any other cause, as here. In *Brown* the plaintiff's hand slipped between a

centralizer pipe or tube and the flights of an auger inside the tube. Also, the accident occurred when product being used exactly as intended, unlike in our case.

Decided in *Messick v. General Motors Corp.*, 460 F.2d 485 (5th Cir. 1972) was the issue of whether the plaintiff had assumed the risk. There was no issue as to the defective and unreasonably dangerous condition of the product. No issue of defective and unreasonably dangerous condition of product was before the court in *Elder v. Crawley Book Machinery Co.*, 441 F.2d 771 (3rd Cir. 1971). At issue in *Walsh v. Miehle-Goss-Dexter, Inc.*, 378 F.2d 409 (3rd Cir. 1967) was the trial court's failure to properly instruct as to the standard of care to be exercised by workmen in cleaning moving machinery.

The *Powell* case cited by Petitioner is a negligence case. *Powell v. E. W. Bliss Co.*, 346 F. Supp. 819 (W.D. Mich. 1972). The court found that the manufacturer breached a duty to the operator of an industrial punch press. The machine continued to cycle after the power turned off due to flywheel momentum. To turn off the machine, the operator had to remove a safety device from her hand. The device was designed to keep the operator's hand out of the press area!

The accident in *Powell* occurred because of the machine's cycling coupled with an inadequately designed safety device which device was designed to meet an obvious and foreseeable danger. Further, there was evidence of realistic possibilities for a better flywheel brake, better guarding devices and some kind of effective warning to new operators of the nonobvious danger of continued cycling after power disconnect. *Powell, supra.*

Only one of the cases cited by Petitioner, at page 24, even involves the issue of defective condition unreasonably dangerous to user. *Rourke v. Garza*, 511 S.W.2d 331 (Tex. Civ. App. — Houston [1st Dist.] 1974, writ granted).[1] Involved in *Rourke* were scaffolding planks or boards delivered without 2″ x 4″ "cleats" on the ends to prevent horizontal or longitudinal slippage while in use on the scaffolds. The boards slipped and plaintiff fell through.

Distinguishing *Rourke* from the case at hand is the testimony in *Rourke* by the contractor-users of the scaffolding that it was customary in the geographic area (Galveston, Texas) for the boards to come from suppliers with "cleats". Also, they testified that it was common knowledge that it is dangerous to use the boards without "cleats". But they did. The employee was injured. And the effect to be given the contractor's knowledge is an issue in the appeal before the Texas Supreme Court. 18 Tex. Sup. Ct. Jr. 169 (Jan. 18, 1975).

Contrary to Petitioner's conclusion stated on page 24 of his Petition, the foregoing cases do not support the District Court's findings on strict product liability. Nor do they materially conflict with the opinion of the Court of Appeals. Simply put, Petitioner fails to show error in the Court of Appeals' determination that CMC's winch was neither defective nor unreasonably dangerous.

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1. It is not final. The *Rourke* case is presently pending on appeal before the Texas Supreme Court, the appeal involving, *inter alia*, the findings of defective condition unreasonably dangerous to plaintiff user. 18 Tex. Sup. Ct. Jr. 169 (Jan. 18, 1975).

IV.

THE COURT OF APPEALS CORRECTLY HELD THAT THE WINCH OF CONSTRUCTION MACHINERY COMPANY, AS DESIGNED, WAS NOT THE PROXIMATE CAUSE OF PETITIONER'S INJURIES.

A. Foreseeability of the Risk.

Having held that the winch design neither rendered the winch defective nor unreasonably dangerous to Petitioner the Court of Appeals proceeded to also find against Petitioner on the causation portion of the liability equation.

The Court of Appeals says that CMC occupies a position nearly identical to Bender. 497 F.2d at 79 (App., Pet. Writ, p. 78). In its discussion of the causation issue relevant to Bender's strict product liability, the Court concludes that the requisite foreseeability was lacking, citing its opinion in *Helene Curtis Industries, Inc. v. Pruitt,* 385 F.2d 841 (1967), wherein the court discusses the need, in abreaction cases, to balance the utility of the risk against the magnitude of the risk from use of a product. As the Fifth Circuit notes in its opinion here, the logic of *Helene Curtis* is applicable to cases of defective design.

Petitioner argues that "common law foreseeability has no place in the concept of strict product liability cases involving defective design". (Pet. for Writ, p. 24). In support of his proposition, Petitioner cites several Texas court cases, but only one federal court of appeals opinion: *Eshbach v. W. T. Grant's and Company,* 481 F.2d 940 (3rd Cir. 1973).

Far from ruling out foreseeability in defective design cases, the Third Circuit in *Eshbach* acknowledges the viability of "foreseeability" in defining the duty of the seller. 481 F.2d at 943. The seller is charged with ". . . foreseeing the probable results of the normal use of the product or a use which can be reasonably anticipated", citing its previous decision in *Kaczmarek v. Mesta Machine Company,* 463 F.2d 675 (3d Cir. 1972). 481 F.2d at 943.

Perhaps what misleads Petitioner about *Eshbach* is the fact that the court in *Eshbach* reversed and remanded the defendant's judgment because of certain contradictions it found in the district court's charge. The *Eshbach* court was of the opinion that the district court in its charge incorrectly implied that the seller's liability under the *Restatement* theory of strict tort liability hinged on the seller's having foreseen the precise manner in which the injury occurred. Although the charge also contained an accurate instruction as to the tort theory, the *Eshbach* court was concerned about the possible resulting jury confusion.

It is interesting to note that the Third Circuit qualifies its discussion of "foreseeable use" by pointing out that the concept does not include "unintended use". *Eshbach,* 481 F.2d at 943 (see footnote). This portion of the opinion is relevant to the instant case. Here, the Fifth Circuit postulates that the use of the winch when the injury occurred was not a foreseeable use. It was an unintended use. The winch was not intended to be powered when a line is tangled. Petitioner was injured because of the deliberate and intentional misuse of the winch. Irrespective of whether Petitioner gave the alleged order to Terry to engage the power, the fact is that the power was

engaged intentionally by Terry. It was this act of Terry's which caused the accident in the opinions of both courts below.

Aside from *Eshbach,* Petitioner cites three Texas cases, two of which are inferior appellate court opinions [*Ethicon, Inc. v. Parten,* 520 S.W.2d 527 (Tex. Civ. App. —Houston [14th Dist.] 1975, no writ hist.); *Hartzell Propeller Co., Inc. v. Alexander,* 485 S.W.2d 943 (Tex. Civ. App.—Waco 1972, writ ref. n.r.e.)]; and only one of which is a state supreme court opinion which is not in point because it involved an impure product, one not manufactured as intended [*Hoover v. O.M. Franklin Serum Co.,* 444 S.W.2d 596 (Tex. Sup. 1969)].

Respondent submits that "foreseeability" of the injury is a necessary element in the theory of strict product liability as generally applied. Whether it be considered a part of the issue of scope of duty, or a part of the causation inquiry, it is a critical element in determining the magnitude of the risk in the use of a product. *Pruitt, supra;* Wade, *supra.* It is an especially critical element when the defect alleged is a design defect, moreover, a safety design intended to avoid enhancement of injury, rather than to avoid the accident itself.

B. Cause-in-fact.

More support appears in favor of the lower appellate court's holding of no legal causation when the facts as to the occurrence of the accident are reviewed. It is unclear from the record, and the district court made no finding, as to how long the cathead continued to turn under power after Williams became tangled in the line. Then only uncertain estimates were given as to how many turns it made after the power was disengaged.

The trial court's determination of causation was premised upon a bunch of inferences. If the cathead had had a brake and if someone had had the presence of mind to apply it and if the brake could have stopped the cathead sooner than it did on its own, then . . . If, if, if . . .

If there had been a brake, would Terry have applied it? He was the one who got out of the way when he saw what had happened. Would Williams have applied it? He was too busy trying to get his hand out of the rope to collect his thoughts to reach for and apply a brake. Would Richo have applied it? He was the most likely candidate. But he was at the back of the boat. If and when he applied a brake, would it have been soon enough?

It is CMC's contention that the trial court's finding that failure to provide an adequate brake caused enhancement of Williams' injuries was based entirely on a strained and speculative inferential chain of "ifs," but no facts. Thus, there is no showing of cause-in-fact, as a matter of law.

V.

EITHER PETITIONER'S CONDUCT CONSTITUTES ASSUMPTION OF THE RISK, OR SEAMAN TERRY'S CONDUCT CONSTITUTES MISUSE OF THE WINCH WHICH WAS THE INTERVENING CAUSE OF PETITIONER'S INJURIES.

Once again, the Petitioner fails to show any conflict between the Court of Appeals treatment of product misuse and assumption of the risk with that of any other court of appeals in a case involving maritime law.

Petitioner's argument at pages 25-27 of his Petition for Writ assumes a defective condition. But the Court of Appeals specifically found no defective condition and no causation. It is submitted that the Court of Appeal's product misuse findings should be treated as the sole independent and intervening legal causes of the accident and the injuries. No primary liability was established. Only Williams and/or Terry's misuse of the winch was established.

A. Petitioner's Assumption of the Risk.

As to the effect to be given Petitioner's assumption of risk (if he gave the order), Petitioner's argument is academic. It is academic because of the Court of Appeal's finding of no primary liability on the part of CMC or Bender.

In the view of the District Court, Petitioner's negligence was in the placement of his hands on the line and in close proximity to the winch. The District Court made no finding on whether Petitioner gave the alleged order to Terry to re-engage power (App., Pet. Writ, pp. 48-49). Terry was considered negligent for his failure to ascertain whether Williams' hands were a safe distance from the winch when he re-engaged power (App., Pet. Writ, p. 41).

The Court of Appeals held that the pivotal issue is whether the alleged order was given to re-engage power to the winch. If Petitioner, the master, gave the order, Terry was not negligent in obeying. If Petitioner did not, then Terry's negligence in re-engaging power was the intervening cause of the accident. In the latter case, Petitioner's positioning of his hands was not a contribut-

ing proximate cause of his injury. 497 F.2d at 73-74 (App., Pet. Writ, pp. 62-66).

Given the positioning of Petitioner's hands and assuming the direct order, such conduct does constitute assumption of the risk. Petitioner voluntarily encountered a known and appreciated danger. *Henrich v. Cutler Hammer Co.*, 460 F.2d 1325 (3rd Cir. 1972); *Texsun Feed Yards, Inc. v. Ralston Purina Company*, 447 F.2d 660 (5th Cir. 1971); *Elder v. Crawley Book Machinery Co.*, 441 F.2d 771 (3rd Cir. 1971); *Restatement (Second) of Torts*, § 402A, Comment n, at 356. In the *Elder* case, *supra*, it was pointed out that where a person who knows of the defect nevertheless chooses to use the product, the manufacturer's obligation to furnish a safe product has been waived by the consumer's choice to chance the danger involved in the defect.

In the *Henrich* case, *supra*, the plaintiff was injured while making an adjustment on a "slitter" machine. Contrary to instruction, plaintiff failed to disengage the power by throwing a power disconnect switch. One was on the machine and a second was located in the area proximate to the machine. Prior to the accident the slitter machine's electrical control system had been malfunctioning and was being serviced. Two co-workers were in the area. Plaintiff sued on a theory of strict liability.

From an adverse jury verdict, he appealed, arguing that he couldn't be held responsible for the danger the machine might be activated by human intervention or some defect. The court held that ". . . it was within the jury's province to find that plaintiff's knowledge of defects of the electrical control system, combined with his disregard of the instructions to disengage the power,

amounted to a voluntary assumption of a known danger." 460 F.2d at 1326, 1327.

Within the context of federal maritime law, assumption of risk has been defined as follows:

> "A seaman to whom two ways were available, one dangerous and the other safe, assumed whatever risk was involved in taking the dangerous course when he selected it through his personal choice and not because of any compulsion or ignorance of the situation. *Johnson v. United States,* 74 F.2d 703, 704 (2d Cir. 1935)."

Hence, the definition of assumption of risk under federal maritime law is equivalent to the definition used by the cases in which § 402A has been applied. An unreasonable voluntary encounter plus knowledge of the defect constitutes assumption of risk.

Now, as to whether to treat assumption of risk as a bar to recovery or to apply comparative negligence, Petitioner cites no authority involving treatment of the defense in a maritime law case involving a claim of strict product liability. Notwithstanding, it should be kept in mind that nowhere in its opinion does the Court of Appeals hold that assumption of risk, or misuse, as defenses, are complete defenses in bar to recovery. Nor did the Court, for that matter, specifically consider them as justifying application of comparative negligence rules.

The fact of the matter is that the lower court holds that CMC—and Bender—was not liable to Petitioner in the first place. There was no primary liability to defeat by defenses of assumption of risk and misuse.

B. Terry's Unintended Misuse.

Turning to the matter of Terry's negligence, his conduct in re-engaging power constitutes misuse, mishandling or abnormal handling, which is a defense to strict product liability. In addition to the lower court, at least four other Circuits have so applied the *Restatement* in diversity cases: Fourth Circuit in *Brown v. General Motors Corp.*, 355 F.2d 814 (1966), cert. den. 386 U.S. 1036; Seventh Circuit in *Downey v. Moore's Time-Saving Equipment, Inc.*, 432 F.2d 1088 (1970); Eighth Circuit in *Schneider v. Chrysler Motors Corp.*, 401 F.2d 549 (1968); and Ninth Circuit in *Tomicich v. Western-Knapp Engineering Company*, 423 F.2d 410 (1970).

The Fifth Circuit has previously applied the *Restatement* rule on product misuse in *Messick v. General Motors Corp.*, 460 F.2d 485 (1972), *Ross v. Up-Right, Inc.*, 402 F.2d 943 (1968), *McDevitt v. Standard Oil Company of Texas*, 391 F.2d 364 (1968) and *Helene Curtis Industries, Inc. v. Pruitt, supra.*

Analogous is the Eighth Circuit opinion in *Leistra v. Bucyrus-Erie Company*, 443 F.2d 157 (1971). A negligence case, there the plaintiff and a co-worker were using the drum on a crawler-type crane for an unintended purpose. A steel cable used to raise and lower the load had spilled out beyond the confines of the drum, and had become wedged between the drum and an adjacent circular chain called the "power-down" chain which operates as a brake in controlling the downward movement of the load. After trying to dislodge the wedged cable by hand, the plaintiff resorted to using a crowbar. At this time the power to the drum was disengaged. Then the crane operator engaged power to move the drum back

and forth. The power-down chain snapped and struck the plaintiff in the face causing his injuries. The drum and power-down unit were recessed in the cab, but unshielded.

The Court held that the legal cause of the plaintiff's injuries was the misuse of the product—turning the drum while the cable was wedged—and not the absence of a safety shield from the chain.

In *Tomicich, supra,* the plaintiff was trying to clean accumulation of mud from one of the sheaves running a conveyor belt. The Ninth Circuit affirmed summary judgment for the defendant. Important to its decision was the plaintiff's familiarity with moving equipment and the availability of safer ways to clean the sheave. CMC would submit that *Tomicich* is a well-reasoned authority for holding Williams' and Terry's misuse bars recovery against CMC.

The plaintiff's disregard of the known risk completely barred his recovery in *Downey, supra* [mechanical rug washer] and in *Brown, supra* [co-worker touched bulldozer starter motor, starting motor and bulldozer, while plaintiff was sitting on track with legs between track and the body].

The Eighth Circuit refused to discard the standard of strict liability and hold the manufacturer an insurer in *Schneider, supra.* The plaintiff injured his eye when looking through the side vent mirror of his car in the dark. The glass pierced his eye. Among other things that court held the plaintiff had misused the side mirror by using it for an unintended purpose.

When Terry deliberately turned the power back on, he and Williams were using the winch for an unintended pur-

pose. Obviously, the winch cathead was not intended to run while a seaman attempts to untangle his line. This was misuse and such should bar any recovery against CMC. Such misuse was the independent cause of the injuries.

VI.

THE DECISION OF THE COURT OF APPEALS WITH RESPECT TO BENDER AND BRASEA IS CORRECT.

A. Bender.

Turning to Petitioner's contentions concerning the Court of Appeals decision as it appertains to Bender and Brasea, this Respondent submits that no material or relevant reasons have been offered by Petitioner which would warrant this Court's exercise of its writ power. Much of the above discussion on the relevant concepts of the law of strict product liability applies equally to Bender. The shortcomings and irrelevancies in Petitioner's argument as it applies to CMC also exist in his challenge of Bender's dismissal from the case.

B. Unseaworthy Condition.

With respect to his challenge of the court's opinion as it relates to Brasea and the claimed unseaworthy condition of the vessel, Petitioner again attempts to frame his argument by raising issues which are simply not in the case in its present posture. Petitioner asserts that the lower court failed to apply maritime law, that the lower court treated assumption of risk and intervening negligence as defenses in bar, and that the court violated the requirement of the "clearly erroneous" rule. Rule 52(a), Federal Rules of Civil Procedure.

To the contrary, the Court of Appeals, on motion for rehearing, merely amended its previous opinion by holding that Petitioner was not entitled to judgment *in rem* against the vessel. (App., Pet. Writ, p. 82). The *in rem* liability of the vessel was premised on the District Court's finding of unseaworthy condition. That finding, in turn, was specifically premised upon the District Court's finding of strict product liability against Bender and CMC. In the opinion of the District Court, it was the defective and unreasonably dangerous condition of CMC's winch and Bender's installation of certain equipment which caused the vessel to be unseaworthy (See footnote, App., Pet. Writ, pp. 81-82).

As the Court of Appeals reasoned, since it had exonerated both CMC and Bender of liability and held that neither CMC's winch nor Bender's installation of equipment created any defective and unreasonably dangerous condition(s), then there were no findings of the District Court left upon which to premise any finding of unseaworthy condition.

Petitioner offers absolutely no authority or reasoning to refute that conclusion. There are no conflicting decisions on the relevant issue of law. The court did not fail to apply maritime law. Petitioner is undone on this point by the limited specifics underlying the finding of unseaworthy condition in the District Court's opinion.

No issue of the treatment or effect of defenses is involved. There's no violation of the "clearly erroneous" rule. It is just that no unseaworthy condition exists, as a matter of law.

C. Terry's Conduct.

Another contention involving Brasea is that raised under the third portion of Petitioner's argument having to do with the effects of his and Terry's conduct (Pet. Writ, pp. 29 et seq). Basically, the Court of Appeals states that given the alleged order by Petitioner, Terry was only doing his duty and had no additional duty to ascertain, in the face of the order, whether Petitioner was in a position of safety. The master ordered him to engage the power and he did.

If Petitioner gave no such order, then Terry was negligent in engaging power to the winch.

Because the District Court was of the opinion that Terry was negligent irrespective of such an order, that court felt it unnecessary to find whether such an order was given. However, since in the view of the Court of Appeals Terry was not negligent if such an order was given, then a resolution of the narrow fact issue becomes crucial. The Court of Appeals did not shift any burden of proof from Brasea to Williams. Instead, it remanded for the District Court to make the additional finding required by the Court of Appeal's application of the maritime law to Terry's duty as a seaman.

CONCLUSION

Despite all of Petitioner's attempts at formulating issues that may appear significant, the real issues actually in this case on appeal are not so significant and only involve the parties. The material issues in the case would not appear to involve ". . . principles the settlement of which is of importance to the public as distinguished from that of the parties . . ."; nor does the case pose any ". . . real and

embarrassing conflict of opinion and authority between the circuit courts of appeal . . ." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

All the seemingly significant issues argued by Petitioner are actually academic. They do not warrant this Court's review. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955).

Presented here is the Court of Appeal's holdings, as a matter of law, that CMC's winch was neither defective nor unreasonably dangerous, and that there was no legal causation.

The Fifth Circuit did not refuse to apply maritime law. No conflict of authorities is demonstrated by Petitioner. The issue about incorporation of strict product liability into maritime law is not only irrelevant to a decision of the case, but, moreover, untimely given the scarcity of consideration of the issue among the circuit courts.

For the reasons stated, Respondent, Construction Machinery Company, respectfully submits that the opinion of the Court of Appeals is in all respects correct, and that the Petition of Roy C. Williams for Writ of Certiorari should be refused.

Respectully submitted,

M. W. MEREDITH, JR.
FINLEY L. EDMONDS
Attorneys for Respondent,
Construction Machinery Company

Of Counsel:

MEREDITH & DONNELL
P. O. Drawer 2624
Corpus Christi, Texas 78403

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari have been deposited with the United States Postal Service, with proper first-class postage affixed thereto (in the case of Cleveland & Shaaber, air mail postage prepaid), certified mail, return receipt requested, addressed to each of the following counsel: J. Robert McKissick, Law Offices of William R. Edwards, P. O. Drawer 480, Corpus Christi, Texas 78403, and Cleveland & Shaaber, Barnett First National Bank Building, Jacksonville, Florida 32202, Attorneys for Petitioner Roy C. Williams; A. J. Watkins, Watkins & Marshall, 750 The Main Building, Houston, Texas 77002, attorney for Bender Welding & Machine Company, Inc.; and Mr. Charles D. Kennedy, Suite 3710, One Shell Plaza, Houston, Texas 77002 and Mr. Jack G. Carinhas, Jr., P. O. Box 71, Brownsville, Texas 78520, attorneys for Petitioner Brasea, Inc., on this _____ day of September, 1975.

M. W. MEREDITH, JR.
FINLEY L. EDMONDS
Attorneys for Respondent,
Construction Machinery Company